SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BERARD,

Appellant,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

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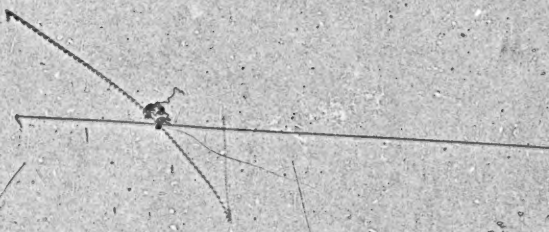

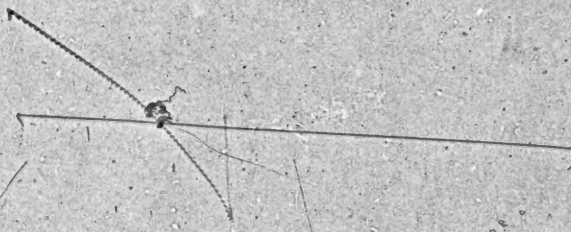

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No. 39898

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Appellee,

vs.

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Appellant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Jack H. Breard, the defendant-appellant in the above matter, submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Louisiana entered in this cause.

Nature of Case

Jack H. Breard was arrested on June 28, 1949, while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences required by Penal Ordinance No. 500.

Such ordinance prohibits, inter alia, the practice of going in and upon residences in the city by solicitors without the prior consent of the owners or occupants of such

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residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared a nuisance and is made punishable as a misdemeanor.

The case was submitted to the City Court of Alexandria Ward, Rapides Parish, Louisiana, upon an agreed Statement of Facts (Tr. P-10), which, for the convenience of the court, we will briefly summarize.

Jack H. Breard, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation, with its main office in the City of Philadelphia, Pennsylvania (Tr. P-11, 15).

Keystone is and has been engaged on a national scale in house-to-house solicitation of subscriptions for nationally known magazines and periodicals, including, among others, The Saturday Evening Post, Ladies Home Journal, Country Gentleman, Newsweek, etc. Keystone operates under contracts with the publishers of such magazines and periodicals, all of whom are located and publish their magazines and periodicals outside of the State of Louisiana (Tr. P-11).

Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which is in charge of a franchised regional representative, who in turn, utilizes crews of solicitors who go from house-to-house in various cities and towns in their regional areas and solicit subscriptions for such magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area spending one or two days in each city or town depending upon its size (Tr. P-11, 13).

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House-to-house subscription solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press, regularly accounting for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines, and more than 30% of the total amount of the annual circulation per issue of such magazines (Tr. P-14).

On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana for the purpose of house-to-house solicitation. The appellant was in charge of this crew and was engaged in such house-to-house solicitation at the time of his arrest (Tr. P-15, 16).

Appellant duly filed a motion to quash (Tr. P-3) on three basic constitutional grounds, namely, that the ordinance violates the Due Process Clauses of the Constitution of Louisiana and of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States; and that the ordinance, as applied to appellant and other solicitors similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I, and Amendment XIV, Section 1 to the Constitution of the United States guaranteeing freedom of speech and of the press.[1]

The appellant's motion to quash was overruled by the City Court and he was found guilty and fined $25.00 or thirty days (Tr. P-8).

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The appellant seasonably filed his appeal from the City Court to the Supreme Court of Louisiana. In his "Specification of Errors", the appellant raised the same constitutional objections mentioned above.

The National Association of Magazine Publishers, Inc., —a trade association of the magazine publishing industry— submitted a brief as amicus curiae, pursuant to leave granted by the Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed appellant's conviction and in so doing expressly rejected the above constitutional objections and sustained the validity of Penal Ordinance No. 500.

Opinion Below

The opinion of the Supreme Court of Louisiana is reported in —— La., —, — 47 So. (2d) 553. A copy of the opinion of the Supreme Court of Louisiana is attached hereto as Appendix A. The City Court of Alexandria Ward, Rapides Parish, Louisiana did not render a written opinion.

Statute (Municipal Ordinance) Involved

The statute, the validity of which is involved, is a municipal ordinance of the City of Alexandria, Louisiana. This ordinance, which was adopted in its present form October 6, 1947, is known as "Penal Ordinance No. 500". The ordinance is not printed in any official edition, but appears in the stipulation of facts as Exhibit A. The provisions of the ordinance, which are pertinent to the present case, are contained in Sections 1 and 2, which read as follows:

> "Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or

invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

"Section 2. Be it Further Ordained, Etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than $100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court."

Section 3 provides that the ordinance does not apply to "the sale, or solicitation of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden products". The present case raises no objection to this section. Section 4 provides that the "ordinance shall go into effect immediately upon its passage" and Section 5 repeals "all ordinances or parts of ordinances in conflict", with such ordinance.

Matters Relating to Jurisdiction

The final judgment of the Supreme Court of Louisiana—the highest court of the state, was entered on June 30, 1950. A Petition for Appeal to the Supreme Court of the United States was presented to the Honorable John B. Fournet, Chief Justice of the Supreme Court of Louisiana on September 25, 1950 and was by him allowed the same day. Accordingly, the presentation of the Petition was made within the prescribed ninety day period, Title 28 United States Code, Section 2101(d) Rule 38½. As already indicated the final judgment sustains the validity of Penal Ordinance No. 500 against appellant's contention that such ordinance was repugnant to the Constitution of the United States.

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Louisiana by appeal is

conferred by Title 28, United States Code, Section 1257, which provides, in so far as is applicable here, as follows:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "2. By appeal, where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The reference in Section 1257(2) to a "statute of any state" has been construed to include "municipal ordinances": *King Manufacturing Company* v. *City Council of Augusta*, 277 U. S. 100, 102 (1928); *Jamison* v. *Texas*, 318 U. S. 413, 414 (1943); and *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70 (1947).

The Federal questions sought to be reviewed were raised at the outset and urged throughout all the proceedings in the courts of Louisiana.

In the City Court of Alexandria Ward, Rapides Parish, Louisiana, the Federal questions were raised by a motion to quash (Tr. P-3) the affidavit on which the prosecution was based. The motion to quash provided in part as follows:

> "3. Said ordinance violates the due process clauses of the Constitution of Louisiana (Art. I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States because, among other reasons, the ordinance arbitrarily, unreasonably and unduly burdens and curtails and in effect, denies the fundamental right of the defendant and others similarly situated to engage in a lawful private business or occupation.
>
> "4. Said ordinance, as applied to defendant and others similarly situated, imposes an undue or dis-

criminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

"5. Said ordinance, as applied to defendant and others similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 to the Constitution of the United States, in that it abridges the freedom of speech or of the press because, among other reasons, it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method."

On appeal to the Supreme Court of Louisiana, which was taken directly from the City Court mentioned above, appellant raised identical federal questions in his "Specification of Errors". Under the Rules of the Supreme Court of Louisiana (Rule X, Section 2) the brief of the appellant is required to set forth "a specification of the alleged errors complained of".

The Supreme Court of Louisiana in its opinion (see Appendix A) expressly set forth the above federal questions almost verbatim (see pages 23 and 24). Also, the Supreme Court of Louisiana expressly sustained the validity of Penal Ordinance No. [illegible]0 and in so doing expressly considered and passed upon such federal questions (see particularly pages 26, 27, 28, 29 and 30).

Appellant in connection with the present appeal has raised by his Assignments of Error precisely the same federal questions discussed above.

The Federal Questions Are Substantial

The ordinance in question is a so-called Green River Ordinance because it is patterned upon an ordinance origi-

nally promulgated by the Town of Green River, Wyoming (Tr. P-15). As pointed out in *City of Mount Penn Stirling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. (2d) 237 (1941) at page 783 "so many state and federal courts have had the ordinance before them that the Green River Ordinance now has a definite place in the judicial parlance of the United States".

As the record shows (Tr. P-13), Green River Ordinances were enacted in over 400 cities during the period 1935-1939; many additional cities and towns have enacted such ordinances since 1939; and today practically every city and important town in the State of Louisiana has adopted such an ordinance.

As will more fully appear under the heading "Due Process" the courts of many states have invalidated this type of ordinance as being an arbitrary and unreasonable exercise of the police power. A few state courts and several federal courts have upheld the ordinance as a valid exercise of the police power.

Accordingly, a decision of the federal issues raised here will not only be of vital importance to the appellant and the entire magazine industry but will be of general interest in clarifying the conflict of authority concerning the constitutionality of this type of ordinance.

Due Process

Appellant submits that Penal Ordinance No. 500 violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental rights of the appellant and others similarly situated to engage in a lawful private business or occupation.

The Due Process Clause of the Fourteenth Amendment does not prohibit state or municipal regulation under the

police power for the public welfare; however "the guarantee of due process, as has often been held, demands * * * that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained". *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934). While the police power may be utilized to prohibit a type of business which is inherently harmful to the public, it may not be utilized to prohibit a harmless and legitimate type of business or occupation; *Nebbia* v. *New York*, 291 U. S. 502, 528 (1934); *Murphy* v. *California*, 225 U. S. 323, 329 (1912); *Liggett Company* v. *Baldridge*, 278 U. S. 105, 113 (1928).

Unquestionably house-to-house solicitation of subscriptions for the American Periodical Press is a legitimate business. As the record indicates, this type of solicitation plays an important and indispensable role in the distribution and circulation of magazines and periodicals (Tr. P-14, 15). Also, the magazines and periodicals involved here are lawful and well known publications and enjoy second class mail privileges under the postal laws of the United States (Tr. P-11).

Moreover, there is nothing in the record to indicate that the appellant, or any other solicitors of Keystone, engaged in any improper conduct in their solicitation efforts in Alexandria. Indeed, the record expressly states that the appellant was arrested "solely on the ground that he had not obtained the prior consent" required by Penal Ordinance No. 500 (Tr. P-11). The record also indicates that all solicitors of Keystone are carefully chosen and are especially trained to perform their solicitation work in a courteous and gentlemanly manner (Tr. P-12).

Also the record indicates that the National Association of Magazine Publishers, Inc. maintains a Central Registry Plan whereunder subscription agencies, like Keystone, and

publishers having their own field selling subscription organizations, register the name, address and description of each of their authorized solicitors. The Central Registry List is furnished from time to time to local police authorities, better business bureaus and chambers of commerce. Under this program, Keystone requires its solicitors to visit the local police authorities of each city or town and identify themselves before starting their solicitation work in such place (Tr. P-13, 14).

The Green River type of ordinance has been described as "perhaps the most drastic local regulation directed at a particular method of doing business". See article entitled "Municipal Legislative Barriers to a Free Market", McIntire and Rhyne, 8 Law and Contemporary Problems, Duke University (1941) page 361. Indeed, the ordinance in practical operation is prohibitive rather than regulatory in nature. The requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitors. As will be demonstrated under the next heading "Interstate Commerce", itinerant solicitors like appellant are unable to carry on their solicitation work in compliance with the ordinance.

A majority of the courts, which have considered the Green River type of ordinance, have declared the ordinance to be unconstitutional.[2] In these cases, the courts have

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[2] *Prior* v. *White*, 132 Fla. 1, 180 So. 347, 116, A.L.R. 1176 (1938); *DeBerry* v. *City of La Grange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); *The City of Osceola, Iowa* v. *C. C. Blair*, 231 Iowa 770, 2 N. W. 2d 83 (1942); *City of Mt. Sterling et al.* v. *Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237 (1941); *Jewel Tea Co.* v. *Town of Bel Air et al.*, 172 Md. 536, 192 Atl. 417 (1937); *Jewel Tea Co. et al.* v. *City of Geneva et al.*, 137 Neb. 768, 291 N. W. 664 (1940); *N. J. Good Humor, Inc.* v. *Board of Com'rs. of Borough of Bradley Beach et al.*, 124 N.J.L. 162, 11 A. 2d 113; *City of McAlester et al.* v. *Grand Union Tea Co. et al.*, 186 Okla. 477, 98 P. 2d 924 (1940); *City of Orangeburg* v. *Farmer*, 181 S. C. 143, 186 S. E. 783 (1936); *Ex Parte Faulkner*, 143 Tex. Crim. Rep. 272, 158 S. W. 2d 525 (1942); *White* v. *Town of Culpeper*, 172 Va. 630, 1 S. E. 2d 269 (1939).

taken the position that the ordinance in its practical operation is an arbitrary, unreasonable and capricious use of the police power and, in effect, prohibits lawful occupations; or that house-to-house solicitation in fact is not a nuisance at all, or at most, merely a private nuisance and, therefore, not subject to abatement by the city under its police power.

On the other hand, a few courts have held the Green River type of ordinance to be constitutional.[3] In these cases, the courts have taken the unrealistic position that the ordinance is merely regulatory and not prohibitory and that uninvited solicitation is a nuisance as it represents an invasion of a householders right of privacy. In so doing, such courts consistently have failed to distinguish between a public and a private nuisance and overlooked the fact that house-to-house solicitation is not in fact a nuisance, but if it were, it would only be a private one for which the perpetrator could not be criminally prosecuted.

In *Town of Green River* v. *Bunger*, cited in Footnote No. 3, the appeal taken to the Supreme Court of the United States on due process and other constitutional grounds was summarily dismissed for want of a substantial federal question. In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, *inter alia*, as a valid exercise of police power on the ground that it protected the householder from annoyance and inconvenience. In the present case, the Supreme

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[3] See *McCormick* v. *City of Montrose*, 105 Colo. 493, 99 P. 2d 960 (1939); *City of Shreveport* v. *Cunningham*, 190 La. 482, 182 So. 649 (1938); *Sam Jones* v. *City of Alexandria*, decided by the Supreme Court of Louisiana in 1950; *Green* v. *Town of Gallup*, 46 N. M. 71, 120 P. 2d 619 (1941); *People* v. *Bohnke*, 287 N. Y. 154, 38 N. E. 2d 478 (1941); *Town of Green River* v. *Bunger*, 50 Wyo. 52, 58 P. 2d 456 (1936), Appeal dismissed 300 U. S. 638; See also *Town of Green River* v. *Fuller Brush Co.*, 65 F. 2d 112 (C.C.A. 10), 88 A.L.R. 177 (1933); *Breard* v. *City of Alexandria*, 69 F. Supp. 722 (1947).

Court of Louisiana (see opinion, page 27) stated that the ordinance was designed to give the occupants of the home protection from persons who might utilize the act of solicitation as a blind for criminal purposes, and the stipulated facts (Tr. P-10) indicate that the ordinance was adopted, *inter alia*, because some householders did not desire any uninvited intrusion into the privacy of their homes.

In *Martin* v. *Struthers*, 319 U. S. 141 (1943) Mr. Justice Black considered and rejected similar contentions to those mentioned above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. In his opinion Mr. Justice Black suggested that the proper solution was for the householder, who did not desire uninvited visitation at his home, to post his premises with appropriate warning signs.

It is respectfully submitted, therefore, that this case presents a substantial federal question as to the validity of Alexandria Penal Ordinance No. 500 under the Due Process Clause. Certainly, the *Bunger* case, decided before the widespread enactment of Green River Ordinances and before their practical and cumulative effect could possibly be forecast, is not a controlling authority on this issue at the present time. Particularly is this so in view of Mr. Justice Black's subsequent opinion in *Martin* v. *Struthers*, *supra*, and the numerous state court decisions invalidating Green River Ordinances on due process grounds.

Interstate Commerce

Appellant submits that Penal Ordinance No. 500 to the extent that it applies to solicitors, like the appellant, who solicit orders for the purchase of magazines subsequently to be shipped interstate to the customer, violates the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). This is true, because the practical

operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce.

In considering the validity of the ordinance under the Commerce Clause, the practical operation of the regulation, actual or potential, rather than its descriptive label or formal character, is determinative of this question. See *Nippert* v. *City of Richmond*, 327 U. S. 416, 424 (1946). Accordingly, it is no answer to this question merely to say, as the Louisiana Supreme Court did, that the ordinance on its face does not prohibit house-to-house solicitation but merely regulates the manner in which it may be done, or that no license or tax is involved, or that it is not discriminatory in that it applies to all solicitors, whether they are soliciting intrastate or interstate business. It is the actual and potential effect of the ordinance upon interstate commerce that is the nub of the question.

In a long line of decisions, commonly known as the "drummer decisions," beginning with *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489 (1887) and culminating with *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the United States Supreme Court has protected the solicitor or drummer of interstate business from state or municipal taxation or license fees or bonding requirements.

In these cases, the Supreme Court has consistently held that the act of solicitation is an essential and initial step for bringing about interstate commerce; that the imposition of a tax or a fixed license fee or a bonding requirement upon solicitors, particularly itinerant solicitors, involves inherently too many probabilities and actualities for exclusion of and discrimination against interstate commerce; and that provincial interests and local political power are at their maximum weight in bringing about this type of

legislation in order to protect local business interests from interstate competition.

Penal Ordinance No. 500 involves, actually and potentially, the same exclusionary and discriminatory effects on interstate commerce as the tax or license ordinances held to be invalid in the "drummer" cases.

In the "drummer" cases, the imposition of the taxes or license fees upon the act of solicitation—the initial phase of interstate commerce—was deemed to have too many actual and potential possibilities of exclusion and discrimination. As the court pointed out in the *Nippert* case (327 U. S. 429), in many instances "the commerce is stopped before it is begun." Penal Ordinance No. 500 likewise imposes a direct burden upon the act of solicitation with similar actual and potential possibilities of exclusion and discrimination by requiring as a condition precedent to house-to-house solicitation the procurement of the prior consent of householders before the solicitation may be made.

Keystone Readers Service, Inc., and its solicitors, as well as other soliciting agencies, are unable to engage in house-to-house solicitation in accordance with the requirements of Penal Ordinance No. 500. The solicitors of Keystone have a low price unit to sell (subscription prices range generally from $2 to $6 per year) and normally spend one or two days in each city or town depending upon its size. Neither the mail nor the phone is used in the solicitation effort (Tr. P-15). The present method of operation by Keystone and its itinerant solicitors—which as a result of experience has become well established generally in the magazine industry—now utilizes the maximum time, effort and expense that can be economically devoted to each city or town and to each prospective sale. According to the stipulation of facts, the present method of operation by

Keystone and its solicitors is the most effective and economical method (Tr. P-15).

Any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both,[4] and the itinerant solicitors to remain for a much longer period of time in each city or town than at present. The resulting inordinate amount of time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile.

Unquestionably a large volume of interstate business today stems from house-to-house solicitation. This is particularly true in the case of the magazine industry. As the record shows (Tr. P-14) field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and more than 30% of the total amount of the annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales. Accordingly, it is manifest that house-to-house solicitation plays an

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[4] The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See *Brevard* v. *City of Alexandria*, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in *City of Alexandria* v. *Jones*, 216 La. 923, 45 So. (2d) 79 (1950). In *Town of Green River* v. *Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456 (1936), an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

indispensable and important role in the distribution and circulation of the American periodical press. Obviously, the ordinance in its practical operation has a substantial exclusionary effect upon interstate commerce.

The actual and potential excluding effects of the ordinance become more apparent and are magnified many times by recalling that the ordinance is a municipal one. Itinerant solicitors, like the appellant, moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The record indicates that such ordinances are becoming very fashionable. Thus, the record indicates that such ordinances were enacted in over 400 cities throughout the nation during the period from 1935 to 1939; that many additional cities and towns have enacted such ordinances since 1939 particularly since World War II; Keystone solicitors encounter these ordinances most frequently in the southern and western states; and that practically every city and important town in the State of Louisiana has adopted such an ordinance (Tr. P-15). A similar potential and actual cumulative effect of the local ordinances involved in the "drummer" cases was recognized and condemned by Mr. Justice Rutledge in the *Nippert* case (327 U. S. at page 429) because such "cumulative burden * * * can only mean the stoppage of a large amount of commerce which would be carried on * * * in the absence of this tax * * *."

Moreover, the ordinance is discriminatory against interstate commerce in favor of local competing business because of its exclusionary and prohibitory effects upon interstate commerce. This discriminatory effect upon interstate commerce invalidates the ordinance despite the fact that it applies to all solicitors, whether they are soliciting intrastate or interstate business. This was expressly pointed

out by the court in the *Nippert* case (327 U. S. pages 431, 432).[5]

In view of the foregoing, actual and potential effects of the ordinance upon interstate commerce, the fact that the ordinance purports to be an exercise of the police power will not save it. *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945). Moreover the Supreme Court has consistently rebuffed attempts to advance or protect local or commercial interests from out-of-state competition by utilizing the police power as a guise for such purpose. *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525 (1949); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, (1935).

In *Town of Green River* v. *Bunger*, 50 Wyo. 52, 58 P. (2d) 456 (1936), an appeal taken to the Supreme Court of the United States on interstate commerce and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, inter alia, as a valid exercise of the police power which had only an incidental effect upon interstate commerce. Certainly, the *Bunger* case, decided back in 1936 before the widespread enactment of Green River Ordinances and before their actual and cumulative effect upon interstate commerce could possibly be forecast, is not a controlling authority on this

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[5] See also article by A. L. Jensen "Burdening Interstate Direct Selling Under Claims of State Police Power," 12 Rocky Mountain Law Review 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 263: "• • • If however, this new legal approach to an old problem be again unmasked as primarily another subterfuge of local merchants, under the false guise of shielding the people from a so-called nuisance, to thus strike effectively at interstate competition then it too ought to be struck down as unconstitutional as all other previous similar attempts have been."

issue at the present time. Particularly is this so in view of the underlying reasoning of the subsequent *Nippert* case, *supra*, and the other decisions of the United States Supreme Court cited above. It is respectfully submitted, therefore, that the present case presents a substantial federal question as to the validity of Alexandria Penal Ordinance No. 500 under the Commerce Clause.

Freedom of the Press

Appellant submits that Alexandria Penal Ordinance No. 500, as applied to appellant and other solicitors of subscriptions for lawful magazines and periodicals, violates Amendments I and XIV to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method.

It is well settled that the constitutional guarantee of freedom of speech and of the press comprehends distribution and circulation, as well as publication. *Ex parte Jackson*, 96 U. S. 727, 733 (1877); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250, (1936); *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938); *Martin* v. *City of Struthers*, 319 U. S. 141, 146 (1943); *Winters* v. *New York*, 333 U. S. 507, 518 (1948). It is also well settled that the fundamental rights of free speech and of free press extend uniformly to individuals and corporations, to secular and business activities, as well as religious and political ones. *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Winters* v. *New York*, 333 U. S. 507, 509-510 (1948).

Moreover, it is well settled that magazines and periodicals are within the scope of the protection afforded by the constitutional guarantees of free speech and a free press. *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936); *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938). In the *Grosjean* case, the court stated as follows at page 250:

> "The predominant purpose of the grant of immunities here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed, and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity."

In the present case, the record shows (Tr. P-11, 16) that the appellant, at the time of his arrest for violating Alexandria Penal Ordinance No. 500 was engaged in house-to-house solicitation of subscriptions for nationally known and distributed periodicals, including Saturday Evening Post, Ladies Home Journal, Newsweek, Cosmopolitan, and other well known magazines. Each issue of such magazines and periodicals contains information of a public character, fiction, advertising, news on political, social and economic questions, and material devoted to literature, history, current events, industry, the sciences and arts; and, as such, the magazines and periodicals enjoy second class mail privileges under the Postal Laws of the United States (Tr. P-11).

Accordingly, appellant was not engaged in the sale or distribution of mere commercial advertising matter. See *Valentine* v. *Christensen*, 316 U. S. 52 (1942).

The record further establishes that field subscription solicitation, in which the appellant was engaged at the time

of his arrest, forms a vital and integral part of the process of distributing and circulating the American Periodical Press, regularly accounting for from 50 to 60 per cent of the total annual subscription circulation of nationally distributed magazines, and more than 30 per cent of the total amount of the annual circulation per issue of such magazines (Tr. P-14).

Appellant has already demonstrated under prior headings, particularly under the heading "Interstate Commerce", that Alexandria Penal Ordinance No. 500 is so unduly burdensome as to be tantamount to a prohibition of house-to-house solicitation of subscriptions for nationally known magazines and periodicals. In *Zimmerman* v. *Village of London, Ohio*, 38 F. Supp. 582 (1941), the Court expressly held this type of ordinance to be a "virtual prohibition" upon distribution and circulation and a violation of the guarantee of freedom of the press.

Assuming that the city of Alexandria may adopt or enact reasonable police regulations as to the time and manner of solicitation within the city limits, appellant submits that it cannot, consistently with the guarantees of the First and Fourteenth Amendments, restrict or prohibit one of the traditional and most important methods of distributing and circulating the American Periodical Press. The fact that *some* householders of the city of Alexandria do not desire any uninvited intrusion into the privacy of their homes (Tr. P-10) or that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (see opinion of court), affords no justification for suppressing magazine subscription solicitation in the manner attempted by the ordinance in question.

In the case of *Martin* v. *City of Struthers*, 319 U. S. 141 (1943), Mr. Justice Black, in the majority opinion, considered and rejected similar contentions to those mentioned

above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. Mr. Justice Black pointed out that the above matters can be so easily controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that the ordinance could serve no purpose other than abridgment of Freedom of Speech and Press. Those householders, who do not wish solicitors to enter upon their property have an effective remedy through the "traditional" method of posting "no trespass" signs. Furthermore, this method may be properly implemented, consistently with constitutional guarantees, by the adoption and enforcement of criminal "trespass after warning" statutes (see *Martin* case, *supra* at pages 147-148; also see *City* v. *Martin*, 199 La. 39, 5 So. 2nd 377). Thus, the decision as to whether solicitors may lawfully call at a home would be left "where it belongs—with the homeowner himself"; and the unlawful usurpation by the city of the rights of home-owners generally, as well as the unlawful abridgment of the rights of free speech and press, entirely avoided.

Accordingly, appellant submits that Alexandria Penal Ordinance No. 500, which, as has been previously pointed out, is prohibitive in effect, abridges Freedom of Speech and of the Press in so far as it applies to solicitors of subscriptions for lawful magazines.

Conclusion

In view of the foregoing, appellant believes that the Supreme Court of the United States has jurisdiction of this appeal and that the Federal questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF LOUISIANA

No. 39898

CITY OF ALEXANDRIA, LOUISIANA,

vs.

JACK H. BREARD

Appeal from the City Court, Alexandria Ward, for the Parish of Rapides, Hon. Gus Voltz, Judge

MOISE, *Justice:*

Jack H. Breard, a resident of Dallas, Texas, and the regional representative of Keystone Readers Service, Inc., which engages in the house-to-house solicitation of magazine subscriptions on a nation-wide scale, has appealed his conviction (and the sentence of $25.00 fine or 30 days in the city jail of Alexandria, imposed thereunder), which arose out of his admitted violation of Ordinance No. 500 of the City of Alexandria, entitled

> "An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or Transient Vendors of Merchandise in the City of Alexandria, Louisiana: Declaring it to Be a Nuisance for Those Engaging in Such Pursuits to go in or upon Private Residences Without Having Been Requested or Invited to do so: Providing Penalties for the Violation Hereof; Repealing All Ordinances in Conflict Herewith."

Appellant contends that said ordinance is unconstitutional in the following respects:

> (1) It arbitrarily, unreasonably and unduly burdens, and in effect, curtails, and in effect, denies the fundamental right of such persons to engage in a lawful private business or occupation, thus violating the Due Process Clauses of the Constitution of Louisiana (Art.

I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States.

(2) As applied to appellant and other solicitors similarly situated, it imposes an undue and discriminatory burden upon interstate commerce, and, in effect, is tantamount to a prohibition of such commerce, in violation of Section 8, Art. I, Clause 3 of the Constitution of the United States.

(3) As applied to appellant and other solicitors similarly situated, it violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 of the Constitution of the United States, in that it abridges the freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount to a prohibition of the utilization of such method.

The identical ordinance was before this Court in the case of City of Alexandria v. Jones, decided February 13, 1950, reported in 45 So. (2d) 79, — La. —. There the defendant was engaged in soliciting orders for photographs, while here the defendant is engaged in soliciting orders for magazine subscriptions. We affirmed the judgment and conviction in the Jones case, and we see no reason to do otherwise in the present case, for the reasons hereinafter set forth.

This same appellant, Breard, attacked (unsuccessfully) the constitutionality of a similar ordinance of the City of Alexandria in the case of Breard v. City of Alexandria, 69 F. Supp. 722 (U. S. D. C., W. D., La., 1947.) The earlier ordinance merely prohibited uninvited solicitation and declared it to be unlawful; the present ordinance declares it to be a nuisance and punishable as a misdemeanor. For all practical purposes, however, the two ordinances are identical.

A similar ordinance of the City of Shreveport was held constitutional and valid by this Court in City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938).

We are therefore irresistibly drawn to the conclusion that the present suit is but another phase of the campaign being

waged so grimly to have these "Green River" ordinances invalidated and declared repugnant to the United States Constitution. Since appellant's field embraces solicitation of orders for printed matters (magazines) which are actually distributed by the United States mail, he has raised the additional question of the freedom of the press. But the real issue remains the same—the *power* of the local governing authority *to regulate* the conduct of businesses of a local nature, in the interest of the public good, under the general delegation of police power from the State; the *reasonableness* of the regulation; and whether it is capable of *impartial administration* without regard to the discretion or judgment of the administering official, board, etc.

The ordinance in question reads as follows:

"Penal Ordinance No. 500

"An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or Transient Vendors of Merchandise in the City of Alexandria, Louisiana; Declaring it to Be a Nuisance for Those Engaging in Such Pursuits to go in or upon Private Residences Without Having Been Requested or Invited to do so: Providing Penalties for the Violation Hereof; Repealing All Ordinances in Conflict Herewith.

"Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or pedding or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

"Section 2. Be it further ordained, etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than $100.00

or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court.

"Section 3. Be it further ordained, etc., that the provisions of this ordinance shall not apply to the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce so far as the sale of the commodities named herein is now authorized by law.

"Section 4. Be it further ordained, etc., that it being deemed by the Council of the City of Alexandria, Louisiana, that an emergency exists, this ordinance shall go into effect immediately upon its passage.

"Section 5. Be it further ordained, etc., that all ordinances or parts of ordinances in conflict herewith are hereby repealed."

That the state and its subdivisions have such authority within certain constitutional limitations is a well-settled principle of constitutional law and needs no further comment. "In the exercise of its police power and in the interest and for the protection of the public, a state may, without denial of the equal protection of the laws, reasonably regulate a business affected with a public interest, or a useful trade, occupation, or profession which may prove injurious to the public. * * * Furthermore, within proper limitations, the legislature may, without denial of equal protection of the laws, classify businesses and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter and is reasonable, and the legislation affects alike all persons pursuing the same business under the same conditions. * * * Any classification or discrimination must not be arbitrary or unreasonable; and the legislation must not be discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or

like conditions and circumstances. The object of legislation regulating a business must be the public good and not benefit to individuals or classes; and a statute allowing one class of persons to engage in what is presumptively a legitimate business, while denying such right to others, is unconstitutional unless it is based on some principle which may reasonably promote the public health, safety, or welfare." Corpus Juris Secundum, verbo "Constitutional Law," Section 510, pp. 1012 ff.

Ordinance No. 500 of the City of Alexandria is by its nature a protective measure, conceived and designed to give the occupants of the home (particularly the housewife herself) and their property additional security against the depredations of the lawless, who often under the guise of soliciting or peddling gain entrance for the purpose of (a) planning a future crime or (b) perpetrating a crime immediately. We are most willing to admit that the solicitors for Keystone Readers Service, Inc., of whom Breard is one, are of the highest character. That does not alter the fact that there are many types of solicitors who are not as carefully selected, nor as reliable, and whose merchandise does not bear the same stamp of general approval as that furnished by Breard's employer. The protecting purpose of the ordinance is proven by the fact that it is not directed against all soliciting, etc., but only against soliciting in *residences without invitation*. Solicitors, peddlers, hawkers, itinerant merchants and transient vendors can still ply their trade in the commercial districts without restriction.

The ordinance provides for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt. There is no opportunity for any public official either to grant or to arbitrarily withhold permission to solicit, nor any opportunity for the abuse of administrative discretion. The ordinance (a) defines the offense, (b) provides for punishment therefor, (c) exempts from its scope purveyors of food as a special category of vendors, (d) provides for immediate passage, and (e) provides for repeal of conflicting ordinances. Certainly it is impersonal in its operation as to all alike. It makes no

distinction between resident solicitors and nonresident solicitors. It is purely a regulation, a limited regulation, by a municipality performing an ordinary function of government, the protection of the home.

Proceeding from what we consider to be the real issue of the case to the special contentions made by the defendant—the violation of the Due Process provisions of the State and Federal constitutions, the interference with interstate commerce, and the denial of the freedom of the press, we shall limit discussion to the last two only, the first being embraced within the conclusion reached as to the reasonableness and impartial administration of the statute.

The Ordinance imposes no tax, no license. It is a prohibition of an activity on local territory, involving the *problematical* sale of a commodity originating in another state, which is actually distributed through the United States mails. It imposes no burden on the distribution itself, nor on the manufacture of the commodity, nor on any phase of the transportation from one place to another of that commodity.

We fail to see how this ordinance constitutes a denial of the freedom of the press. It imposes no previous censorship on publication of these magazines for which orders are solicited, nor does it interfere with their distribution, since the method of distributing magazines is either direct to the patrons via the mails, or through newsstands. No one has made the claim that Breard or his co-solicitors actually sell the magazines copy by copy from door to door. That indeed would be a reductio ad absurdum.

A salient feature of this case, which seems to have escaped previous attention, is that, transcendent over the rights which appellant claims are infringed by this ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy. Each community knows its own problems best; and if local governments, being as they are closest to the popular will, choose to exercise the sovereign's right to protect a particular class of comparatively defenseless citizens—housewives, we will not intervene to destroy that protection.

The litigation here relates to the power of the municipality to enact the ordinance and the legality of the enactment. The appellant has contended that the enactment is illegal because it offends the commerce clause and the freedom of the press. On the question of construction we should likewise take into consideration other amendments of the Constitution of the United States so as not to enlarge the grant of power contended for by the opponents and not to diminish the right of enactment for protection as contended for by the municipality. The Fifth Amendment of the Constitution of the United States is to protect the man against the nation; the Fourteenth Amendment to shield him in the security of the home in his person and property rights against the tyranny of the state; the Tenth Amendment to prevent the Congress and the Executive Department from exercising any power not delegated by the Constitution, and all powers not so specifically delegated are to be exercised by the State or the people. Its purposes were to let the government have only the necessary powers, the State all those powers not expressly reserved by enumeration in the Federal Constitution. The constitution of the United States and these amendments set forth specific bounds to the activities of Congress, necessary safeguards to the sovereignty of the States, puts defenses around the man and the security of his person and property from unlawful search and seizure amplified by Amendment Four of the Constitution; and in addition to these it also establishes a judicial department to see that these limitations be not transgressed. "The Courts were designed," wrote Hamilton, "to be an intermediate body between the people and the legislature and the Executive Department in order among other things to keep these departments within the limits assigned to their authority." These Amendments, and particularly Amendment Ten of the Constitution of the United States, should not be "shorn of all their vitality."

So rapidly do the rights and powers of business grow by what it feeds on that the State is being rapidly pushed out of the Union as a self-governing entity, and what is unbelievable—even to those who see it—is that the

unbalancing of constitutional relations, this betrayal of the necessary and just sovereignty of the State, has been conceived, promoted without a closed season by members of the Congress elected by the people. Any appearance here of criticism as distinguished from earnest conviction would be an error of the mind and not of the heart. The right of the sovereign to safeguard the safety of the home and to better insure a domestic tranquillity throughout the nation is a purpose set out in the preamble of the Constitution of the United States. It is true that the preamble is not one of the provisions of the Federal Constitution, and it is also true that the constitution emanated from the people and not the states and that it was ordained to insure a more perfect union; its objects and its purposes expressed in that instrument presupposes its existence in perpetuity. The denial of the right to enact the ordinance by the municipality is to lessen the effectiveness of the preamble of the constitution of the United States emanating from the people, the source of all power.

The ordinance is a matter of local concern and of local importance, a matter of the ordinary functions of government. It is well established constitutional law that "implied constitutional restrictions are just as effective as those that are directly expressed." Among those which are implied, though not expressed, is That the *Nation* May not in the Exercise of its Powers Prevent a State from Discharging the Ordinary Functions of Government." [Italics ours]. *South Carolina* v. *U. S.*, 199 U. S. 45; *Hepburn* v. *Griswold*, 12 Wall. 534. Therefore, when this ordinance was passed, the City of Alexandria was performing an ordinary function of government, a right which the nation will not deny. It is the actual infringement on the provisions of the Federal Constitution that is interdicted, not the exercise of the ordinary functions of government by the municipality.

For the reasons assigned, the judgment and sentence appealed from are hereby affirmed.